IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISIION APPLICATION NO.169 OF 2006

Balkrishna Dattaram Mahadik .. Petitioner

versus

Ms.Roshan Jahangiri Lentin & ors. .. Respondents

...

Mr.Madhav Jamdar for the petitioner.

Mr.G.S. Godbole for respondent nos.1 to 4.

CORAM : D.G. KARNIK, J

DATED : 23rd November 2006

P.C.:

1. Admit. By consent taken up for hearing forthwith.

2. This revision application is directed against the order dated 24th March 2006 passed by the appellate bench of the Small Causes Court Bombay allowing Appeal No.465 of 2005 and passing a decree for possession against the revision petitioner.

3. The respondents are the trustees of a public charitable trust. The petitioner was employed as a gardener by the respondents since the year 1975. According to the respondent the petitioner attained the age of super annuation on 31st December 2002 and retired from service by the end of December 2002. While in service, the petitioner was occupying the suit premises by reasons of his being in the employment of the respondents. On petitioners super annuation the respondents asked him to vacate the suit premises but as he avoided by an advocate's notice dated 29th May 2003 the respondents terminated his tenancy and called upon him to vacate the suit premises. By reply dated 19th June 2003 the petitioner contended that he had not attained the age of super annuation i.e. 60 years as on 31st December 2002 and therefore, he was not liable to vacate the suit premises. The respondents thereafter filed a suit bearing Suit no.243/264 of 2003 against the petitioner for eviction under section 16(1)(f) of the Maharashtra Rent Control Act. The petitioner did not file any written statement but he was allowed to cross examine the respondents' witness. After considering the evidence of the respondents the trial court came to the conclusion that the respondents have proved that the suit premises were occupied by the petitioner by reason of his being in the employment of the respondents. However, it

held that the respondents had not proved that the petitioner had retired from service. In this view of this, the trial court dismissed the suit. On respondents' appeal, the appellant bench reversed the decision of the trial court. It held that the petitioner had retired from service and tenancy of the petitioner was terminated. The appellate bench therefore allowed the appeal by its judgement and order dated 24th March 2006 and passed a decree for possession. That judgement is impugned in this revision application.

4. At the outset, it must be mentioned that the jurisdiction of this court under section 115 of the Code of Civil Procedure is limited. It can interfere in the decision of the lower appellate court only on three grounds viz. i) the lower court has exercised the jurisdiction not vested in it (ii) the lower court has failed to exercise the jurisdiction vested in it and (iii) the lower court has acted in exercise of its jurisdiction illegally or with material irregularity. Admittedly first two clauses do not apply to the present case and the enquiry would therefore be restricted to see whether the lower appellate court acted illegally as material irregularity or the decision is perverse.

5. Learned counsel for the petitioner submitted that even though the petitioner had not filed the written statement he was entitled to show that the plaintiffs'

case was not proved; that he could demonstrate only by cross examination of the respondents' witnesses. Though he had not filed the written statement, he had a right to cross-examine the respondents' witness because the court had not proceeded under Order Rule 5 or Rule 10 of Order 8 of the Code of Civil Procedure. The court had called upon the respondents to prove their case by adducing the evidence. Once that was done the petitioner had a right to cross examine the respondents' witness. The trial court had rightly permitted the petitioner to cross-examine the respondents' witness and had rightly taken into consideration admissions given in the cross-examination. The appellate bench erred in ignoring the said admissions given by the respondents' witness in the cross-examination. In support of these submissions, learned counsel for the petitioner referred to and relied upon two decisions of the Supreme Court in Balraj Taneja Vs. Sunil Madan reported in (1999) 8 SCC 396 and Modula India Vs. Kamakshya Singh Deo reported in (1988) 4 SCC 619.

6. In Balraj Taneja Vs.Sunil Madan, the Supreme Court considered the provisions of Order 8 Rule 10 and Order 8 Rule 5 of the Code of Civil Procedure and held that even if the written statement is not filed, court ought not to act blindly and mechanically to pass a decree under Order 8 Rule 10. Though Order 8 Rule 10 enables the Court to pass a decree upon not filing of the

written statement by the defendant the Court is not obliged to do so, but the court can pass such other order as it may think fit including an order requiring the plaintiff to prove the facts pleaded in the plaint. If the plaint itself indicates existence of disputed questions of fact regarding which two different versions are set out in the plaint itself, it would not be safe to pass a judgement without requiring the plaintiff to prove the facts so as to settle the factual controversy.

7. In Modula India Vs. Kamakshya SIngh Deo (Supra) the Supreme Court held that even when the defence of the defendant was struck off that could not deprive the defendant of further participating in the case in any manner. The right of the defence to cross examine the plaintiff must be looked upon not as a part of the strategy of defence but rather as a requirement without which the plaintiff’s evidence cannot be acted upon. Though the defence of the defendant has been struck off, there is nothing in law to preclude him from demonstrating to the court that the plaintiff’s witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfil the terms of the statute under which a decree is sought.

8. The ratio of the decision of the Supreme Court in the case of Balraj Taneja and Modula India can be summarised thus:

. Order 8 Rule 10 of the Code of Civil Procedure enables a court to pass a decree forthwith on the defendant's failure to file his written statement. Where the defendant fails to file the written statement when required by law to do so, the fact that the defendant has not filed the written statement can be treated by the court as admission of the facts stated in the plaint and on that basis the court can pas a decree forthwith. However, it is not as if the court must pass a decree forthwith where the defendant fails to file a written statement. Order 8 Rule 10 itself provides that on failure of the defendant to file written statement within time permitted or fixed by the Court, the Court may pronounce the judgement against him or make such order in relation to the suit as it thinks fit. First part of Order 8 Rule 10 enables to court to pronounce the judgement on failure of the defendant to file the written statement. The latter part of Order 8 Rule 10 states that the Court may pass such order in relation to the suit as it thinks fit. Such other order includes an order to be passed by the Court requiring the plaintiff to prove his case by adducing evidence. Where the defendant has not filed the written statement or after having filed the written statement his defence is struck off, the defendant can still participate in the suit by cross examining the plaintiff's witness. The right of cross examination is not for the purpose of the

defendant’s proving his own case in the cross examination but by showing the falsities in the case of the plaintiff. The defendant can cross examine the plaintiff to show that plaintiff’s case is false or can show that on the basis of the facts proved the requirement of any statute under which a decree is claimed are not fulfilled and therefore the plaintiff is not entitled to a decree. In a suit under the Rent Act, defendant may by cross examination the plaintiff’s witness to show that no ground on which a decree under a Rent Act can be claimed is made out or proved. Similarly, in a suit for specific performance the defendant may show that the plaintiff was not ready and willing to perform his part of the contract which the plaintiff is required to prove under section 16(c) of the Specific Relief Act.

9. In the present case, it can be seen that on failure of the petitioner to file the written statement, the court did not act mechanically or did not strategy pass the decree under Order 8 Rule 10 of the Code of Civil Procedure. It required the respondents to prove their case by adducing evidence. Accordingly, the respondents examined Ms.Roshan Jehangir as a witness. Examination in chief was recorded on affidavit and petitioner defendant was given an opportunity of cross examining her. Thus, the Court followed the requirements laid down by the Supreme Court and did not commit any illegality, or material irregularity in exercise of its

jurisdiction. It followed the principles laid down by the Supreme Court in the two cases referred to above.

10. The appellate bench was entitled to re-appreciate the evidence and decide all questions of fact. The appellate bench accordingly reappreciated the evidence and decided the questions of fact. In my view, the view taken by the appellate bench is not only a possible but a pre-ponderant view. The petitioner in his reply to the notice had not disputed that he was allowed to occupy the suit premises by reason of his being in the employment of the respondents. He even did not file the written statement. In the cross-examination of the respondents witness also, no suggestion was made to the witness that the petitioner was not allotted the suit premises by reason of his being in the employment but was allotted the suit premises independently of the employment. The cross examination only related to the question whether petitioner had attained the age of superannuation i.e. 60 years. Therefore, the fact of suit premises were allotted to the petitioner by reason of his being in the employment of the respondent, was never disputed. The trial court as well as the appellate court have concurrently held that the suit premises were given to the petitioner by reason of his being in the employment. That finding is not disputed before me.

11. As regards the age of the petitioner,

respondents have pleaded that in the year 1975 when the petitioner was appointed, his age was noted as 33 years and therefore he attained the age of 60 years in the year 2002. The best documentary evidence, if any, like birth certificate, school leaving certificate or any other record showing his date of birth would obviously be in possession of the petitioner. He did not file any document on record to show what was his age. He did not confront the respondents' witness with any document which would have indicated that petitioner had not attained the age of 60 years. Under section 106 of the Evidence Act, the burden of proving any fact is within the special knowledge of any person the burden of proving that fact is on that person. In the absence of any material before the court to indicate what was the age of the petitioner, the trial court erred in holding that the petitioner had not attained the age of super annuation and the lower appellate court corrected that error. In any event, the view taken by the lower appellate court, petitioner had attained the age of super annuation is a possible view on facts which cannot be said to be in any way perverse. It is not open for interference in exercise of a revisional jurisdiction under section 115 of the Code of Civil Procedure.

12. For these reasons, there is no merit in the revision application which is hereby dismissed but the facts and circumstances of the case without any order as

to costs.

13. After this judgement was pronounced in the open court, Mr.Jamdar learned counsel for the petitioner prayed for some time to vacate the suit premises. Learned counsel for the respondent fairly submitted that a reasonable time for vacating the suit premises may be granted to the petitioner on he and his family members furnishing an undertaking in the usual form. Accordingly, the petitioner is granted one year’s time to vacate the suit premises subject to his furnishing an undertaking in the usual form of himself and all his adult family members including his sons, daughters in law and daughters in this court within a period of eight weeks.

D.G. KARNIK, J